



6714-01-P

## **FEDERAL DEPOSIT INSURANCE CORPORATION**

### **12 CFR Parts 303 and 308**

#### **RIN 3064-AF19**

### **Incorporation of Existing Statement of Policy Regarding Requests for Participation in the Affairs of an Insured Depository Institution by Convicted Individuals**

**AGENCY:** Federal Deposit Insurance Corporation.

**ACTION:** Notice of proposed rulemaking.

**SUMMARY:** The Federal Deposit Insurance Corporation (“FDIC”) proposes to revise the existing regulations requiring persons convicted of certain criminal offenses to obtain prior written consent before participating in the conduct of the affairs of any depository institution to incorporate the FDIC’s existing Statement of Policy, and to amend the regulations setting forth the FDIC’s procedures and standards applicable to an application to obtain the FDIC’s prior written consent. Following the issuance of final regulations, the FDIC’s existing Statement of Policy would be rescinded. The proposed incorporation of the Statement of Policy into the FDIC’s regulations would provide for greater transparency as to its application, provide greater certainty as to the FDIC’s application process and help both insured depository institutions and affected individuals to understand its impact and to potentially seek relief from its provisions.

**DATES:** Comments must be received on or before **[INSERT DATE 60 DAYS AFTER PUBLICATION IN THE FEDERAL REGISTER].**

**ADDRESSES:** You may submit comments, identified by RIN 3064-AF19, by any of the following methods:

- **Agency Web Site:** <https://www.fdic.gov/regulations/laws/federal/propose.html>. Follow instructions for submitting comments on the Agency Web site.
- **E-mail:** [Comments@fdic.gov](mailto:Comments@fdic.gov). Include RIN 3064-AF19 on the subject line of the message.
- **Mail:** Robert E. Feldman, Executive Secretary, Attention: Comments, Federal Deposit Insurance Corporation, 550 17<sup>th</sup> Street, NW., Washington, DC 20429.
- **Hand Delivery:** Comments may be hand delivered to the guard station at the rear of the 550 17th Street Building (located on F Street) on business days between 7:00 a.m. and 5:00 p.m.

**Public Inspection:** All comments received will be posted without change to <https://www.fdic.gov/regulations/laws/federal/propose.html>, including any personal information provided. Paper copies of public comments may be ordered from the FDIC Public Information Center, 3501 North Fairfax Drive, Room E-1002, Arlington, VA 22226 by telephone at (877) 275-3342 or (703) 562-2200.

**FOR FURTHER INFORMATION CONTACT:**

Brian Zeller, Review Examiner (319) 395-7394 x4125, or Larisa Collado, Section Chief (202) 898-8509, in the Division of Risk Management Supervision; or Michael Condon,

Counsel, (202) 898 6536, John Dorsey, Acting Supervisory Counsel, (202) 898-3807, or Andrea Winkler, Acting Assistant General Counsel, (202) 898-3727 in the Legal Division.

## **SUPPLEMENTARY INFORMATION:**

### **I. Policy Objectives**

The policy objective of the proposed rule is to clarify the FDIC's application of section 19 of the FDI Act (section 19), clarify the application process for insured depository institutions and individuals who seek relief from the provisions of section 19, and seek public comment on additional proposals that could expand the scope of relief available for minor offenses. The FDIC has issued a Statement of Policy for Section 19 of the Federal Deposit Insurance Act (SOP), which provides the public with guidance relating to section 19 and the FDIC's application thereof. The current version of the SOP, with some modifications over time, has been a published resource for the public for over twenty years; however, some uncertainty may exist because the terms and procedures outlined in the SOP have not been adopted as regulations by the FDIC. To remove potential ambiguities about the FDIC's application of section 19 or the application process, the proposed rule will incorporate the current content of the SOP into its rules and procedures, thereby further clarifying its existing practices enforcing section 19. Additionally, the FDIC seeks comment from members of the public, including but not limited to, insured depository institutions, other financial institutions and companies, individual depositors and consumers, employees and prospective employees of insured depository institutions or other financial services institutions that have applied for or been

granted relief from the provisions of section 19, and civil rights organizations, consumer groups, trade associations, and other members of the financial services industry regarding the scope of section 19, possible amendments to the relief process, the scope of the *de minimis* offense exemption, and the treatment of expunged criminal records.

## **II. Background**

The FDIC seeks to incorporate its SOP, which is issued pursuant to section 19 of the Federal Deposit Insurance Act,<sup>1</sup> into its existing Procedures and Rules of Practice. Section 19 prohibits, without the prior written consent of the FDIC, any person from participating in banking who has been convicted of a crime of dishonesty or breach of trust or money laundering, or who has entered a pretrial diversion or similar program in connection with the prosecution for such an offense. Further, the law forbids an insured institution from permitting such a person to engage in any conduct or to continue any relationship prohibited by section 19. It also imposes a ten-year ban against the FDIC's consent for a person convicted of certain crimes enumerated in Title 18 of the United States Code, absent a motion by the FDIC and approval by the sentencing court.

The FDIC issued originally, after notice and comment, the current SOP in December 1998<sup>2</sup> to provide the public with guidance relating to section 19 and the FDIC's application thereof. The 1998 SOP, among other things, instituted a set of criteria to provide for blanket approval of certain low-risk crimes, and for persons convicted of such *de minimis* crimes to forgo filing an application.

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<sup>1</sup> 12 U.S.C. 1829.

<sup>2</sup> 63 FR 66177 (Dec. 1, 1998).

A clarification to the SOP was issued in 2007, based on the 2006 amendment to Section 19 of the FDI Act by section 710 of the Financial Services Regulatory Relief Act of 2006,<sup>3</sup> which modified section 19 to include coverage of institution-affiliated parties (IAPs) participating in the affairs of bank holding companies, or savings and loan holding companies, and gave supervisory authority over such entities to the Board of Governors of the Federal Reserve System (Federal Reserve Board) and the Office of Thrift Supervision (OTS), respectively.<sup>4</sup> The FDIC, in 2011, further clarified the SOP as to: (i) the applicability of section 19 to IAPs of bank and savings and loan holding companies; (ii) the meaning of the term “complete expungement;” and (iii) the factors for considering which convictions are considered *de minimis*.<sup>5</sup> In December of 2012, the FDIC modified the *de minimis* exception to filing by changing the amount of the maximum potential fine to qualify for *de minimis* treatment from \$1,000 to \$2,500. The modification also changed the limit on the amount of jail time needed to qualify for the *de minimis* exception from no jail time served to a maximum number of three days spent in jail.<sup>6</sup>

The current version of the SOP was last revised by the Board of Directors in August of 2018,<sup>7</sup> after notice and comment. The 2018 revisions made a number of substantive changes in addition to some grammatical and format changes. The FDIC provided that institutions it supervised could make conditional offers of employment to

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<sup>3</sup> Pub. L. 109-351, 120 Stat. 1966,

<sup>4</sup> The FDIC amended the SOP by including a footnote which noted the authority of the Federal Reserve Board and the OTS with regard to bank and savings and loan holding companies under section 19. 72 FR 73823 (Dec. 8, 2007) with correction issued at 73 FR 5270 (Oct. 13, 2008). In May of 2011, the FDIC subsequently eliminated the footnote added in December of 2007 and incorporated the change directly into the text of the SOP. It also noted the coming transfer of authority under the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank), 12 U.S.C. 5301 *et seq.*, of savings and loan holding company jurisdiction to the Federal Reserve Board.

<sup>5</sup> 76 Fed. Reg. 28031 (May 13, 2011).

<sup>6</sup> 77 Fed. Reg. 74847 (Dec. 18, 2012).

<sup>7</sup> 83 Fed. Reg. 38143 (Aug. 3, 2018).

individuals provided they were not hired until the institution had determined that they were not barred by section 19. The FDIC clarified when section 19 applied to certain persons who are not employees, officers, directors or shareholders of an insured depository institution. The FDIC also deleted language referencing the change that expanded section 19's application to bank and savings and loan holding companies and simply noted that if a person also seeks to participate in the affairs of a bank or savings and loan holding company, they may be required to comply with any requirements of the Federal Reserve Board under 12 U.S.C. 1829(d) and (e).

In regard to considering applications, the FDIC included language addressing when an application will be considered by the FDIC, which states that the FDIC will not consider an application unless all of the sentencing requirements associated with the conviction, or the conditions imposed by a pretrial diversion or similar program, are completed, and the court's decision must be considered final under the procedures of the applicable jurisdiction.

The FDIC also added additional language to address questions regarding complete expungements and made clear that, if the expungement is intended to be complete under the law of the jurisdiction that issues the expungement, and the jurisdiction intends that no governmental body or court can use the prior conviction or program entry for any subsequent purpose, then the fact that the records have not been timely destroyed, or that there exist copies of the records that are not covered by the order sealing or destroying them, will not prevent the expungement from being considered complete for the purposes of section 19.

The FDIC also added language that treats certain convictions that have been set aside or reversed after the sentencing requirements have been completed in the same manner as pretrial diversion or similar programs are treated, unless the reason that the conviction was set aside or reversed is based on a finding on the merits that the conviction was wrongful. In addressing pretrial diversions or similar programs, the FDIC clarified how such programs would be identified by stating that whether a program constitutes a pretrial diversion or similar program is determined by relevant Federal, state or local law, and if that program is not so designated under applicable law, then the determination will be made by the FDIC on a case-by-case basis.

The FDIC also expanded the application of provisions for *de minimis* offenses where an application would not be required and it would be deemed approved. The general provisions for the application of *de minimis* were changed in two ways. The definition of jail time was clarified and the previous *de minimis* category for bad or insufficient fund checks was expanded and set out as a separate basis for applying the *de minimis* exception to filing. The FDIC created new exceptions to the filing requirement. First, a person with a covered conviction or program entry where the acts leading to the conviction or program entry occurred when the person was 21 or younger who also meets the general *de minimis* exception to filing and who has completed all sentencing or program requirements, will qualify for this *de minimis* exception to filing if at least 30 months have passed prior to the date an application would otherwise be required. Second, an exception to filing would apply when the conviction or program entry is based on a small dollar theft of goods, services, and/or currency (or other monetary instrument) and the aggregate value of the goods, services and/or currency was \$500 or

less at the time of the conviction or program entry. Additionally, the individual must have only one conviction or program entry under section 19, and five years must have passed since the conviction or program entry.

The provision related to bad or insufficient funds checks was also expanded to apply to all such convictions or program entries provided that there was no other program entry for an offense covered by section 19, the total amount of the checks did not exceed \$1,000 and that no insured depository institution or credit union was a payee on any of the bad or insufficient funds checks. Lastly, the use of a fake or altered identification to purchase alcohol or to enter a premises where age appropriate identification was required would not require an application provided there was no other conviction or program entry for an offense covered by section 19.

The FDIC also clarified that no conviction for a violation of certain Title 18 provisions, as set out in 12 U.S.C. 1829(a)(2), can qualify under any of the *de minimis* exceptions to filing that are set out in the SOP and that drug convictions or program entries which currently require an application can fall within the *de minimis* exceptions to filing that are set out in the SOP.

The FDIC provided additional information directing individual applicants to file their application with the FDIC Regional Office covering the state where the person lives and also adjusted the language in the evaluations section of the SOP to more closely mirror the language in 12 CFR 308.157 as well as stated that, under the provision that allows the FDIC to consider other appropriate factors, the FDIC may contact the primary Federal and /or state regulator to aid in the evaluation of an application.



Lastly, the FDIC added clarifying language related to bank-sponsored applications that makes clear that changes in an individual's duties at the insured institution which filed a previously approved section 19 application on that individual's behalf will require a new application. There is also a clarification that a new application will be required if an individual, covered by a previously approved bank-sponsored application, desires to participate in the affairs of another insured depository institution.

### **III. The Proposal**

The FDIC has determined that the current provisions of the SOP should be incorporated into its rules and procedures in order to provide for greater transparency as to its application, provide greater certainty as to the FDIC's application process and to aid both insured depository institutions and individuals who may be affected by section 19 of the FDI Act to understand its impact and potentially seek relief from its provisions. The FDIC will also rescind those sections of 12 CFR 308, subpart M, which would be duplicative of the changes needed to Part 303, subpart L, and will revise the remaining sections to insure conformity for any request for a hearing when an application under section 19 has been denied.

Currently, 12 CFR part 303, subpart L provides only very basic information as to the need to file an application with the FDIC in order to obtain the written permission of the FDIC required by section 19 so that the person may be employed by, or own or control, or participate in the affairs of an insured depository institution. Further, while some additional details about the filing process were set out in 12 CFR part 308, subpart M, the information was still not as complete as it could have been, and some parts of Part 308, subpart M were actually duplicative of what was in Part 303, subpart L. The better

approach would be to describe the complete application process in Part 303, subpart L and amend Part 308, subpart M to address the procedures and rules that could be followed if an application is denied and a hearing is sought.

Therefore, consistent with the foregoing, the FDIC is proposing to rescind subpart L of 12 CFR part 303, and replace and rename it with a new subpart and to revise and amend, as well as rename, subpart M of Part 308. While much of the SOP has been incorporated into the proposed revised subpart L of part 303, some adjustments to the language have been made to add clarification, correct grammar and style consistent with a regulation and, occasionally, reformatted to fit the regulatory scheme.

*A. Revised Provisions of 12 CFR part 303, subpart L*

1. §303.220 What is section 19 of the FDI Act?

This section combines portions of the scope section in the existing 12 CFR §303.220 and the introduction part of the SOP. Paragraph (a) is the scope provisions from the existing §303.220. Paragraph (b) sets out the application of section 19 to insured depository institutions including the conditional offers of employment that FDIC supervised institutions may make as is in the existing SOP. Paragraph (c) comes from the SOP and addresses the need for an application.

2. §303.221 Who is covered by section 19?

This section identifies who is covered by section 19 and comes mainly from the existing SOP. Paragraph (a) defines institution affiliated parties and others who may fall within the scope of section 19. Paragraph (b) defines the term “person” for the purposes of section 19 as an individual not a legal entity. Paragraph (c) addresses when a person is covered under 12 U.S.C. 1829(a) and must file an application with the FDIC even if the

person is also covered under 12 U.S.C. 1829(d) and (e), which would require an application approved by the Board of Governors of the Federal Reserve System for an individual at the bank or saving and loan holding company. Paragraph (d) defines when “ownership” or “control” results in the application of section 19 to an individual or individuals who may be deemed in control of, or be deemed to be an owner of, an insured depository institution.

3. §303.222 What offenses are covered under section 19?

This section comes mainly from the SOP and addresses what is a criminal offense under section 19. Paragraph (a) defines when a criminal offense constitutes a crime of dishonesty or breach of trust. Paragraph (b) requires that, to determine if the criminal offense is one of dishonesty, breach of trust, or money laundering, the FDIC will look to the statutory elements of the criminal offense or to court decisions in the relevant jurisdiction that have found the criminal offense to be one of dishonesty, breach of trust or money laundering. Paragraph (c) requires an application for all drug offenses, except for simple possession, unless the criminal offense meets the criteria in §303.227 for not filing an application.

4. §303.223 What constitutes a conviction under section 19?

This section comes mainly from the SOP. Paragraph (a) addresses that there must have been a conviction and that section 19 does not apply to arrests, pending cases not brought to trial, or any conviction reversed on appeal unless the person has entered a pretrial diversion or similar program as set out in §303.224. Paragraph (b) addresses what constitutes a complete expungement for the purposes of section 19. Paragraph (c) excludes youthful offender adjudgments for minors from the scope of section 19.

5. §303.224 What constitutes a pretrial diversion or similar program (a program entry) under section 19?

This section comes mainly from the SOP. Paragraph (a) defines what constitutes a pretrial diversion or similar program and excludes program entries that occurred prior to November 29, 1990. Paragraph (b) states that expungements of program entry records will be treated the same as expungements of convictions.

6. §303.225 What are the types of applications that can be filed?

This section is a combination of the existing §303.221, §308.158 and the SOP. Paragraph (a) establishes the institution filing requirement. Paragraph (b) establishes the procedure to apply when an insured depository institution will not file an application for an individual.

7. §303.226 When is an application to be filed?

This section comes mainly from the SOP. This section states when an application is to be filed excepting from its requirement those covered offenses which are considered *de minimis* under subpart L. An application will not be considered by the FDIC until all sentencing requirements associated with a conviction have been met or all requirements of the program entry have been completed.

8. §303.227 When is an application not required for a covered conviction or program entry?

This section comes mainly from the SOP. Paragraph (a) establishes the general criteria for *de minimis* convictions or program entries for which, if the criteria are met, the person is deemed automatically approved and no application will be required. Paragraph (b) establishes certain other specific exceptions to the filing requirement which

if met will be deemed automatically approved. Paragraph (b)(1) shortens the five- year waiting period under the general criteria to 30 months when all the elements of the offense occurred before the person is age 21 or younger and the person meets the criteria established by that exception to filing. Paragraph (b)(2) establishes the criteria, which if met, provides that certain convictions or program entries for bad or insufficient funds checks will not require an application. Paragraph (b)(3) establishes the criteria, which if met, provides that certain small dollar simple theft convictions or program entries of \$500 or less will not require an application. Excluded from this exception to filing are convictions or program entries for burglary, forgery, identity theft, and fraud. Paragraph (b)(5) establishes the criteria which, if met, provides that the use of a fake or false identification by a person under the legal age to purchase alcohol or used to enter premises where alcohol is served but where age appropriate identification is required to enter the premises will not require an application. Paragraph (c) requires that, for any case where the person is able to avail themselves of the *de minimis* exception to filing, they must disclose the convictions or program entries to the insured depository institution and must qualify for a fidelity bond to the same extent as others in a similar position. Paragraph (d) states that any conviction or program entry for criminal offenses under Title 18 set out in 12 U.S.C. 1829(a)(2) cannot qualify for *de minimis* exception to filing an application.

9. §303.228 How to file an application.

This section comes from the SOP. This section provides the requirement that an insured depository institution is to file an application on behalf of an individual under section 19 to participate in its affairs unless the FDIC grants the individual a waiver for

good cause shown to file on their own behalf. Insured depository institutions should file with the FDIC's Regional Office where the institution's home office is located and any waiver and application on behalf of an individual should be filed with the FDIC's Regional Office where the person lives.

10. §303.229 How an application is evaluated.

This section comes from a combination of § 308.157 and the SOP. Paragraph (a) sets out the ultimate determination the FDIC will make as to the level of risk the applicant poses to an insured depository institution and whether it will consent to allow the person to participate in an insured depository institution's affairs. In evaluating the risk posed by the person's participation the FDIC has established nine factors that it will look at, including other factors that might be relevant to a particular application. Paragraph (b) states that the question of whether a person was guilty of the offense for which the person was convicted, or had a program entry for, is not an issue for Part 303, subpart L or for part 308, subpart M. Paragraph (c) states that it will apply the factors and determination used in paragraph (a) when evaluating an application which is made to terminate the ten-year ban in 12 U.S.C. 1829(a)(2). Paragraph (d) provides that the person must be bonded the same as others in that position and the person must disclose the covered conviction or program entry to any insured depository institution in which they intend to participate. Paragraph (e) provides that for bank-sponsored applications the approval is to work a specific job at a specific bank and that the bank may be required to seek permission from the FDIC before there is a significant change in a person's duties and/or responsibilities and the Regional Director may request a new application.

Approval to work at a specific insured depository institution is limited to that institution and a new application is required to work at another insured depository institution.

11. §303.230 What will the FDIC do if the application is denied?

This section is a combination of the current §§303.223, 308.157 and 308.159. Paragraph (a) provides that the FDIC will provide a written denial which will summarize or cite the relevant factors from the proposed §303.229. Paragraph (b) provides that the applicant can file a written request for a hearing pursuant to Part 308, subpart M within 60 days of the denial.

12. §303.231 Waiting time for a subsequent application if an application is denied.

This section comes mainly from §308.158 and was clarified so that an applicant will need to wait one year from the date of the denial or decision of the FDIC Board, or its designee.

*B. Revised Provisions of 12 CFR part 308, subpart M*

1. §308.156 Scope.

This section has been revised to reflect its application to denials that are issued pursuant to 12 CFR part 303, subpart L

2. §308.157 Relevant considerations.

This section will be rescinded.

3. §308.158 Filing Papers and effective date.

This section will be rescinded.

4. §308.159 Denial of Application.

This section has been revised to reflect the outcome of the application process in Part 303, subpart L and to clarify the procedure by which a hearing may be requested. It will be renumbered as §308.157.

5. §308.160 Hearings.

This section will remain as it currently exists but will be renumbered as §308.158. After renumbering, §§308.159 and 309.160 will be reserved.

#### **IV. Expected Effects**

The FDIC expects the proposed rule to have relatively small effects on the public and insured institutions. The FDIC currently insures 5,312 depository institutions which could be affected by the proposed rule.<sup>8</sup> Additionally, as discussed previously, the proposed rule would apply to certain persons covered by the provisions of section 19 who are or wish to become employees, officers, directors or shareholders of an insured depository institution. In the period from 2014 through 2018, the FDIC received 21 bank-sponsored section 19 applications, an average of four per year. Additionally, the FDIC received 500 individual section 19 applications during the same period, an average 100 per year.<sup>9</sup> Therefore, the FDIC estimates that the proposed rule would affect at least four FDIC-insured depository institutions, and 100 individuals per year.

As described previously, the proposed rule incorporates the current content of the SOP into the FDIC's regulations; therefore, it poses no substantive changes for potential applicants, either insured institutions or individuals. Additionally, although codifying the current content of the SOP into the FDIC's regulations could change enforcement of that

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<sup>8</sup> FDIC Call Report Data, June 30, 2019.

<sup>9</sup> Application Tracking System.



content, in practice it is unlikely to pose any substantive effect on covered entities and individuals. The FDIC considers individuals who have been convicted of a crime of dishonesty, breach of trust, or money laundering, who participate in the affairs of an insured depository institution without the prior written consent of the FDIC, to be violations of section 19, and will continue to do so if the proposed rule is adopted in its current form. Therefore, the proposed rule is unlikely to pose any substantive change in the FDIC's enforcement of section 19. As such, removing the existing regulation 12 CFR part 303, subpart L and establishing a new subpart L, which incorporates the FDIC's existing SOP, as well as renaming, removing, and amending certain provisions of 12 CFR part 308, subpart M is unlikely to have any substantive effects on the current section 19 application process or the FDIC's enforcement of section 19.

To the extent that the current content of the FDIC's SOP conveys any ambiguity as to the FDIC's application of section 19 or the application process, the proposed rule would benefit covered entities and individuals by further clarifying this topic and process. However, the FDIC believes any such effects are likely to be relatively small because the FDIC has received bank-sponsored section 19 applications from less than 0.08 percent of FDIC-insured institutions, per year, on average,<sup>10</sup> or section 19 applications from individuals who represent less than 0.004 percent of people employed in the credit intermediation sector of the U.S. economy.<sup>11</sup>

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<sup>10</sup>  $(4 / 5312) * 100 = 0.075$  percent.

<sup>11</sup> According to the Bureau of Labor Statistics (BLS) 2,631,500 people were employed in the Credit Intermediation & Related Activities (NAICS 522000) sector in the second quarter of 2019.  $(100 / 2631500) * 100 = 0.0038$  percent. See Bureau of Labor Statistics, Current Employment Statistics, Credit Intermediation and Related Activities: NAICS 522, June 2019, Extracted on November 20, 2019 (8:20:49 PM).

The FDIC invites comments on all aspects of this analysis. In particular, would the proposed rule have any costs or benefits that the FDIC has not identified?

## **V. Alternatives**

The FDIC considered one alternative to the proposed rule but believes that the proposed amendments represent the most appropriate option for covered entities and individuals. The FDIC considered the status quo alternative of retaining the existing section 19 SOP and regulations.<sup>12</sup> However, the FDIC believes that the proposed rule further clarifies the FDIC's application of section 19 of the FDI Act and the application process for insured depository institutions and individuals who seek relief from its provisions, while posing no substantive costs, relative to the status quo alternative.

The FDIC invites comments on its consideration of alternatives. In particular, are there other alternatives that the FDIC should consider?

## **VI. Request for Comments**

- 1) The FDIC seeks comment on all aspects of its approach to section 19 and more specifically in the questions that follow.
- 2) The FDIC has received previous inquiries and comments from the public regarding section 19's scope that catches a number of minor offenses in perpetuity. In response to these concerns, the FDIC has established *de minimis* criteria, which have been expanded in 2007, 2011, 2012, and 2018. The FDIC continues to process low-risk cases that, in our experience, present a high likelihood of approval. For this reason, the FDIC seeks comments regarding the *de minimis* criteria for offenses that represent low-risk to the Deposit Insurance Fund while maintaining a balanced approach of reducing

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<sup>12</sup> 12 CFR part 303, subpart L and 12 CFR part 308, subpart M.

regulatory burden to the industry and individuals while maintaining the integrity of section 19.

- 3) One of the specific *de minimis* categories involves the use of a fake identification for a person under the age of 21 in an attempt to purchase alcohol. The FDIC seeks comments on whether the *de minimis* criteria should be expanded and what if any additional situations involving low risk convictions should be covered by this category.
- 4) The FDIC seeks comment on whether the five-year post-conviction cooling off period should be modified for certain offenses, and whether additional timeframes should be considered for various offenses.
- 5) The FDIC has received previous inquiries and comments from the public related to expungements of convictions. Expungements have been a source of confusion for the industry and individual applicants. The FDIC has attempted to address these concerns by clarifying the term “complete expungement” for section 19 purposes and has made changes to the SOP in 2011 and 2018. However, despite these changes, expungements continue to be a source of confusion. For this reason, the FDIC seeks comments regarding the applicability of section 19 to expungements.

Written comments must be received by the FDIC no later than [INSERT DATE 60 DAYS AFTER PUBLICATION IN THE FEDERAL REGISTER].

## **VII. Regulatory Analysis and Procedure**

### *A. The Paperwork Reduction Act*

In accordance with the requirements of the Paperwork Reduction Act (“PRA”),<sup>13</sup> the FDIC may not conduct or sponsor, and the respondent is not required to respond to,

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<sup>13</sup> 44 U.S.C. 3501 *et seq.*

an information collection unless it displays a currently valid Office of Management and Budget (“OMB”) control number. The proposed rule will not create any new or revise any existing information collections pursuant to the PRA. Therefore, no information collection request will be submitted to the OMB for review.

### *B. The Regulatory Flexibility Act*

The Regulatory Flexibility Act (“RFA”) generally requires an agency, in connection with a proposed rule, to prepare and make available for public comment an initial regulatory flexibility analysis that describes the impact of a rule on small entities.<sup>14</sup> However, a regulatory flexibility analysis is not required if the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. The Small Business Administration (“SBA”) has defined “small entities” to include banking organizations with total assets of less than or equal to \$600 million that are independently owned and operated or owned by a holding company with less than or equal to \$600 million in total assets.<sup>15</sup> Generally, the FDIC considers a significant effect to be a quantified effect in excess of 5 percent of total annual salaries and benefits per institution, or 2.5 percent of total noninterest expenses. The FDIC believes that effects in excess of these thresholds typically represent significant effects for FDIC-supervised institutions. As discussed further below, the FDIC certifies that, if adopted, this proposed

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<sup>14</sup> 5 U.S.C. 601 *et seq.*

<sup>15</sup> The SBA defines a small banking organization as having \$600 million or less in assets, where an organization's “assets are determined by averaging the assets reported on its four quarterly financial statements for the preceding year.” *See* 13 CFR 121.201 (as amended by 84 FR 34261 (July 18, 2019), effective August 19, 2019). In its determination, the “SBA counts the receipts, employees, or other measure of size of the concern whose size is at issue and all of its domestic and foreign affiliates.” *See* 13 CFR 121.103. Following these regulations, the FDIC uses a covered entity’s affiliated and acquired assets, averaged over the preceding four quarters, to determine whether the covered entity is “small” for the purposes of RFA.

rule will not have a significant economic impact on a substantial number of FDIC-supervised small entities.

The FDIC insures 5,312 depository institutions, of which 3,947 are defined as small banking organizations according to the RFA.<sup>16</sup> In the period from 2014 through 2018, the FDIC received 15 bank-sponsored section 19 applications from small, FDIC-insured institutions, an average of three per year. Additionally, the FDIC received 500 section 19 applications from individuals during the same period, an average 100 per year.<sup>17</sup> To determine the maximum number of small, FDIC-supervised institutions who could be affected by the proposed rule this analysis assumes that each applicant is seeking employment at a different bank, and that each bank is a small, FDIC-insured institution. Based on these assumptions it follows that annual section 19 applications can affect at most 103 (2.6 percent) small, FDIC-insured institutions on average, annually.<sup>18</sup> However, in the FDIC's experience, section 19 applications from individuals are compelled by the applicant's intent to seek employment at FDIC-insured institutions that are generally not small. Therefore, the FDIC believes that the number of small, FDIC-insured institutions affected by the proposed rule is likely to be smaller than 103. The FDIC estimates that the proposed rule would affect at least three, but no more than 103 small, FDIC-insured institutions, per year.

As described previously, the proposed rule incorporates the current content of the SOP into the FDIC's regulations; therefore, it poses no substantive changes for potential applicants. Additionally, although codifying the current content of the SOP into the FDIC's regulations could change enforcement of that content, in practice it is unlikely to

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<sup>16</sup> FDIC Call Report, June 30, 2019.

<sup>17</sup> Application Tracking System.

<sup>18</sup>  $(103 / 3947) * 100 = 2.61$  percent.

pose any substantive effect on covered entities and individuals. The FDIC considers individuals who have been convicted of a crime of dishonesty, breach of trust, or money laundering, who participate in the affairs of an insured depository institution without the prior written consent of the FDIC, to be violations of section 19, and will continue to do so if the proposed rule is adopted in its current form. Therefore, the proposed rule is unlikely to pose any substantive change in the FDIC's enforcement of section 19. As such, removing the existing regulation at 12 CFR part 303, subpart L and establishing a new subpart L which incorporates the FDIC's existing SOP, as well as renaming, removing, and amending certain provisions of 12 CFR part 308, subpart M is unlikely to have any substantive effects on the current section 19 application process or the FDIC's enforcement of section 19 for small, FDIC-insured institutions.

To the extent that the current content of the SOP conveys any ambiguity as to the FDIC's application of section 19 or the application process, the proposed rule would benefit covered entities by further clarifying this topic and process. However, the FDIC believes any such effects are likely to be relatively small because section 19 applications received by the FDIC represent at most 2.6 percent of small, FDIC-insured institutions, per year, on average.

Based on the information above, the FDIC certifies that the proposed rule would not have a significant economic impact on a substantial number of small entities.

The FDIC invites comments on all aspects of the supporting information provided in this section, and in particular, whether the proposed rule would have any significant effects on small entities that the FDIC has not identified.

### *C. Plain Language*

Section 722 of the Gramm-Leach-Bliley Act<sup>19</sup> requires each Federal banking agency to use plain language in all of its proposed and final rules published after January 1, 2000. As a Federal banking agency subject to the provisions of this section, the FDIC has sought to present the proposed rule in a simple and straightforward manner. The FDIC invites comments on whether the proposal is clearly stated and effectively organized, and how the FDIC might make the proposal easier to understand. For example:

- Has the FDIC organized the material to suit your needs? If not, how could it present the rule more clearly?
- Have we clearly stated the requirements of the rule? If not, how could the rule be more clearly stated?
- Does the rule contain technical jargon that is not clear? If so, which language requires clarification?
- Would a different format (grouping and order of sections, use of headings, paragraphing) make the regulation easier to understand? If so, what changes would make the regulation easier to understand?
- What else could we do to make the regulation easier to understand?

*D. Riegle Community Development and Regulatory Improvement Act of 1994*

The Riegle Community Development and Regulatory Improvement Act of 1994 (“RCDRIA”) requires that each Federal banking agency, in determining the effective date and administrative compliance requirements for new regulations that impose additional reporting, disclosure, or other requirements on insured depository institutions, consider, consistent with principles of safety and soundness and the public interest, any

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<sup>19</sup> 12 U.S.C. 4809.

administrative burdens that such regulations would place on depository institutions, including small depository institutions, and customers of depository institutions, as well as the benefits of such regulations. In addition, new regulations and amendments to regulations that impose additional reporting, disclosure, or other new requirements on insured depository institutions generally must take effect on the first day of a calendar quarter that begins on or after the date on which the regulations are published in final form.<sup>20</sup> The FDIC invites comments that further will inform its consideration of RCDRIA.

### **List of Subjects**

#### 12 CFR Part 303

Administrative practice and procedure, section 19 of the FDI Act (consent to service of persons convicted of certain criminal offenses).

#### 12 CFR Part 308

Rules of practice and procedure, procedures and standards applicable to an application pursuant to section 19.

For the reasons stated in the preamble and under the authority of 12 U.S.C. 1819 (Seventh and Tenth), the Federal Deposit Insurance Corporation proposes to amend parts 303 and 308 of title 12 of the Code of Federal Regulations as follows:

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<sup>20</sup> 12 U.S.C. 4802.



## **PART 303—FILING PROCEDURES**

1. The authority citation for Part 303 continues to read as follows:

Authority: 12 U.S.C. 378, 1464, 1813, 1815, 1817, 1818, 1819(a) (Seventh and Tenth), 1820, 1823, 1828, 1831a, 1831e, 1831o, 1831p-1, 1831w, 1835a, 1843(l), 3104, 3105, 3108, 3207, 5414, 5415 and 15 U.S.C. 1601-1607.

2. Revise Part 303, Subpart L as follows:

### **Subpart L—Section 19 of the FDI Act (Consent to Service of Persons Convicted of, or Who Have Program Entries for, Certain Criminal Offenses)**

Sec.

- |         |   |
|---------|---|
| 303.220 | What is section 19 of the FDI Act?  |
| 303.221 | Who is covered by section 19?   |
| 303.222 | What offenses are covered under section 19?   |
| 303.223 | What constitutes a conviction under section 19?   |
| 303.224 | What constitutes a pretrial diversion or similar program (program entry) under section 19?                |
| 303.225 | What are the types of applications that can be filed?   |
| 303.226 | When must an application to be filed?   |
| 303.227 | When is an application not required for a covered offense or program entry ( <i>de minimis</i> offenses)? |
| 303.228 | How to file an application.   |
| 303.229 | How an application is evaluated.  |
| 303.230 | What will the FDIC do if the application is denied?   |
| 303.231 | Waiting time for a subsequent application if an application is denied.                                    |

### **Subpart L—Section 19 of the FDI Act (Consent to Service of Persons Convicted of, or Who Have Program Entries for, Certain Criminal Offenses)**

#### **§ 303.220 What is section 19 of the FDI Act?**

(a) This subpart covers applications under section 19 of the Federal Deposit Insurance Act, 12 U.S.C. 1829 (FDI Act). Under section 19, any person who has been convicted of any criminal offense involving dishonesty, breach of trust, or money laundering, or has agreed to enter into a pretrial diversion or similar program (program entry) in connection with a prosecution for such offense, may not become, or continue as,

an institution-affiliated party of an insured depository institution; own or control, directly or indirectly, any insured depository institution; or otherwise participate, directly or indirectly, in the conduct of the affairs of any insured depository institution without the prior written consent of the FDIC.

(b) In addition, the law bars an insured depository institution from permitting such a person to engage in any conduct or to continue any relationship prohibited by section 19. Insured depository institutions should therefore make a reasonable inquiry regarding an applicant's history to insure that a person who has a conviction or program entry covered by the provisions of section 19 is not hired or permitted to participate in its affairs without the written consent of the FDIC issued under this subpart. FDIC supervised insured depository institutions may extend a conditional offer of employment contingent on the completion of a background check satisfactory to the institution and to determine if the applicant is barred under section 19 but the job applicant may not work for, be employed by or otherwise participate in the affairs of the insured depository institution until the insured depository institution has determined that the applicant is not barred under section 19.

(c) If there is a conviction or program entry covered by the bar of section 19, an application under this subpart must be filed seeking the FDIC's consent to become, or to continue as, an institution-affiliated party, to own or control, directly or indirectly, an insured depository institution or to otherwise participate, directly or indirectly, in the affairs of the insured depository institution. The application must be filed, and consented to, prior to serving in any of the foregoing capacities unless such application is not required under the subsequent provisions of this subpart. The purpose of an application

is to provide the applicant an opportunity to demonstrate that, notwithstanding the bar, a person is fit to participate in the conduct of the affairs of an insured depository institution without posing a risk to its safety and soundness or impairing public confidence in that institution. The burden is upon the applicant to establish that the application warrants approval.

**§303.221 Who is covered by section 19?**

(a) Section 19 covers institution-affiliated parties, as defined by 12 U.S.C. 1813(u), and others who are participants in the conduct of the affairs of an insured depository institution. Therefore, all employees of an insured depository institution that falls within the scope of section 19, including de facto employees, as determined by the FDIC based upon generally applicable standards of employment law, will also be subject to section 19. Whether other persons who are not institution-affiliated parties are covered depends upon their degree of influence or control over the management or affairs of an insured depository institution. In the context of the FDIC's application of section 19, coverage would apply to an insured depository institution's holding company's directors and officers to the extent that they have the power to define and direct the management or affairs of an insured depository institution. Similarly, directors and officers of affiliates, subsidiaries or joint ventures of an insured depository institution or its holding company will be covered if they participate in the affairs of the insured depository institution or are in a position to influence or control the management or affairs of the insured institution. Typically, an independent contractor does not have a relationship with the insured depository institution other than the activity for which the institution has contracted. An

independent contractor who influences or controls the management or affairs of the insured depository institution would be covered by section 19.

(b) The term "person," for purposes of section 19, means an individual, and does not include a corporation, firm or other business entity.

(c) Individuals who file an application with the FDIC under the provisions of section 19 who also seek to participate in the affairs of a bank or savings and loan holding company may have to comply with any filing requirements of the Board of the Governors of the Federal Reserve System under 12 U.S.C. 1829(d) and (e).

(d) Section 19 specifically prohibits a person subject to its provisions from owning or controlling an insured depository institution. The terms "control" and "ownership" under section 19, shall have the meaning given to the term "control" in the Change in Bank Control Act (12 U.S.C. 1817(j)(8)(B)). A person will be deemed to exercise "control" if that person has the power to vote 25 percent or more of the voting shares of an insured depository institution (or 10 percent of the voting shares if no other person has more shares) or the ability to direct the management or policies of the institution. Under the same standards, a person will be deemed to "own" an insured depository institution if that person owns 25 percent or more of the institution's voting stock, or 10 percent of the voting shares if no other person owns more. These standards would also apply to an individual acting in concert with others so as to have such ownership or control. Absent the FDIC's consent, persons subject to the prohibitions of section 19 will be required to divest their control or ownership of shares above the foregoing limits.

**§303.222 What offenses are covered under section 19?**

(a) The conviction or program entry must be for a criminal offense involving dishonesty, breach of trust or money laundering. "Dishonesty" means directly or indirectly to cheat or defraud; to cheat or defraud for monetary gain or its equivalent; or wrongfully to take property belonging to another in violation of any criminal statute. Dishonesty includes acts involving want of integrity, lack of probity, or a disposition to distort, cheat, or act deceitfully or fraudulently, and includes offenses that Federal, state or local laws define as dishonest. "Breach of trust" means a wrongful act, use, misappropriation or omission with respect to any property or fund that has been committed to a person in a fiduciary or official capacity, or the misuse of one's official or fiduciary position to engage in a wrongful act, use, misappropriation or omission.

(b) Whether a crime involves dishonesty, breach of trust or money laundering will be determined from the statutory elements of the offense itself or from court determinations that the statutory provisions of the offense involve dishonesty, breach of trust or money laundering.

(c) All convictions or program entries for offenses concerning the illegal manufacture, sale, distribution of, or trafficking in controlled substances shall require an application unless no application is required under this subpart. Convictions or program entries for criminal offenses involving the simple possession of a controlled substance are not covered under section 19.

**§303.223 What constitutes a conviction under section 19?**

(a) *Convictions requiring an application.* There must be a conviction of record. Section 19 does not cover arrests, pending cases not brought to trial, acquittals, or any conviction that has been reversed on appeal unless the person has entered a pretrial diversion program, or similar program, as set out §303.224. A conviction with regard to which an appeal is pending requires an application. A conviction for which a pardon has been granted will require an application. Convictions that are set aside or reversed after the applicant has completed sentencing will be treated consistent with pretrial diversions or similar programs unless the court records reflect that the underlying conviction was set aside based on a finding on the merits that such conviction was wrongful. A conviction that has been completely expunged is not considered a conviction of record and will not require an application.

(b) *Complete expungements.* If an order of expungement has been issued in regard to a conviction and it is intended by the language in the order itself, or in the legislative provisions under which the order was issued, to be a complete expungement, then the jurisdiction, either in the order or the underlying legislative provisions, forbids the conviction or program entry to be used for any subsequent purpose including, but not limited to, an evaluation of a person's fitness or character. The failure to destroy or seal the records will not prevent the expungement from being considered complete for the purposes of section 19 in such a case.

(c) *Youthful offenders.* An adjudication by a court against a person as a "youthful offender" under any youth offender law applicable to minors as defined by state law, or any adjudgment as a "juvenile delinquent" by any court having jurisdiction over minors as defined by state law does not require an application. Such an adjudication does not

constitute a matter covered under section 19 and is not a conviction or program entry for determining the applicability of section 303.227.

**§303.224 What constitutes a pretrial diversion or similar program (program entry) under section 19?**

(a) A program entry is characterized by a suspension or eventual dismissal or reversal of charges or criminal prosecution often upon agreement, whether formal or informal, by the accused to treatment, rehabilitation, restitution, or other noncriminal or non-punitive alternatives. Whether a program constitutes a pretrial diversion or similar program is determined by relevant Federal, state or local law, and, if not so designated under applicable law then the determination of whether it is a pretrial diversion or similar program will be made by the FDIC on a case-by-case basis. Program entries prior to November 29, 1990, are not covered by section 19.

(b) Expungements of pretrial diversion or similar program entries will be treated the same as those for convictions.

**§303.225 What are the types of applications that can be filed?**

(a) *Institution filing requirement (bank-sponsored applications).* Applications are required to be filed by the insured depository institution which intends for a person covered by the provisions of section 19 to participate in its affairs. Bank-sponsored applications are reviewed, as required by this subpart, by the appropriate FDIC Regional Office as required by this subpart and may be approved or denied by the Regional Office pursuant to delegated authority. A denial of an application must be with the certification

of the General Counsel or designee that the denial is consistent with purposes of section 19.

(b) *Waiver applications.* If an insured depository institution does not file an application regarding an individual, the individual may file a request for a waiver of the institution filing requirement. Such a waiver application shall be filed with the appropriate Regional Office and shall set forth substantial good cause why the application should be granted. The Director of the Division of Risk Management Supervision, or designee, may grant or deny applications requesting waivers of the institution filing requirement. The authority delegated under this section shall be exercised only upon the concurrent certification of the General Counsel, or designee, that the action to be taken is not inconsistent with section 19 of the FDI Act.

### **§303.226 When must an application to be filed?**

Except for situations in which no application is required under this subpart, an application must be filed when there is present a conviction by a court of competent jurisdiction for a covered offense by any adult or minor treated as an adult, or when such person has entered a pretrial diversion or similar program regarding that offense. Before an application is considered by the FDIC, all of the sentencing requirements associated with a conviction, or conditions imposed by the pretrial diversion or similar program, including but not limited to, imprisonment, fines, condition of rehabilitation, and probation requirements, must be completed, and the case must be considered final by the procedures of the applicable jurisdiction. The FDIC's application forms as well as additional information concerning section 19 can be accessed at the FDIC's regional



offices or on the FDIC website at:

<https://www.fdic.gov/regulations/laws/forms/section19.html>.

**§303.227 When is an application not required for a covered offense or program entry (*de minimis* offenses)?**

(a) *In General.* Approval is automatically granted and an application will not be required where the covered offense is considered *de minimis*, by meeting all of the following criteria:

- (1) There is only one conviction or program entry of record for a covered offense;
- (2) The offense was punishable by imprisonment for a term of one year or less and/or a fine of \$2,500 or less, and the individual served three (3) days or less of jail time. The FDIC considers jail time to include any significant restraint on an individual's freedom of movement which includes, as part of the restriction, confinement to a specific facility or building on a continuous basis where the person may leave temporarily only to perform specific functions or during specified times periods or both. The definition is not intended to include those on probation or parole who may be restricted to a particular jurisdiction, or who must report occasionally to an individual or to a specified location;
- (3) The conviction or program was entered at least five years prior to the date an application would otherwise be required; and
- (4) The offense did not involve an insured depository institution or insured credit union.

(b) *Other types of offenses for which the de minimis exception applies and no application is required.*

(1) *Age of person at time of covered offense.* If the actions that resulted in a covered conviction or program entry of record all occurred when the individual was 21 years of age or younger, then a subsequent conviction or program entry that otherwise meets the general *de minimis* criteria in (a) above, will be considered *de minimis* if the conviction or program entry was entered at least 30 months prior to the date an application would otherwise be required and all sentencing or program requirements have been met.

(2) *Convictions or program entries for insufficient funds checks.* Convictions or program entries of record based on the writing of "bad" or insufficient funds check(s) shall be considered *de minimis* offenses under this provision and will not be considered as involving an insured depository institution if the following applies:

(i) There is no other conviction or program entry subject to section 19, and the aggregate total face value of all "bad" or insufficient funds check(s) cited across all the conviction(s) or program entry(ies) for bad or insufficient funds checks is \$1,000 or less; and

(ii) No insured depository institution or insured credit union was a payee on any of the "bad" or insufficient funds checks that were the basis of the conviction(s) or program entry(ies).

(3) *Convictions or program entries for small-dollar, simple theft.* A conviction or program entry based on a simple theft of goods, services and/or currency (or other monetary instrument) where the aggregate value of the currency, goods and/or services taken was \$500 or less at the time of conviction or program entry, where the person has no other conviction or program entry under section 19, where it has been five years since

the conviction or program entry (30 months in the case of a person 21 or younger as described above) and which does not involve an insured depository financial institution or insured credit union is considered *de minimis*. Simple theft excludes burglary, forgery, robbery, identity theft, and fraud.

(4) *Convictions or program entries for the use of a fake, false or altered identification card.* The use of a fake, false or altered identification card by a person under the legal age for the purpose of obtaining or purchasing alcohol, or used for the purpose of entering a premise where alcohol is served but for which age appropriate identification is required, provided that there is no other conviction or program entry for a covered offense, will be considered *de minimis*.

(c) *Fidelity bond coverage and disclosure to institutions.* Any person who meets the criteria under this section shall be covered by a fidelity bond to the same extent as others in similar positions, and shall disclose the presence of the conviction or program entry to all insured depository institutions in the affairs of which he or she intends to participate.

(d) *Non-qualifying convictions or program entries.* No conviction or program entry for a violation of the Title 18 sections set out in 12 U.S.C. 1829(a)(2) can qualify under any of the *de minimis* exceptions to filing set out in this section.

### **§303.228 How to file an application.**

Forms and instructions should be obtained from, and the application filed with, the appropriate FDIC Regional Director. The application must be filed by an insured depository institution on behalf of a person (bank-sponsored) unless the FDIC grants a

waiver of that requirement (individual waiver). Such waivers will be considered on a case-by-case basis where substantial good cause for granting a waiver is shown. A person seeking an individual waiver may request the waiver when filing an application on their own behalf. The appropriate Regional Office for an bank-sponsored application is the office covering the state where the insured depository institution's bank's home office is located. The appropriate Regional Office for an individual filing for a waiver of the institution filing requirement is the office covering the state where the person resides. States covered by each FDIC Regional Office can be located on the FDIC's home page in the contacts section.

#### **§303.229 How an application is evaluated.**

(a) The ultimate determination in assessing an application are whether the person has demonstrated his or her fitness to participate in the conduct of the affairs of an insured depository institution, and whether the affiliation, ownership, control or participation by the person in the conduct of the affairs of the institution may constitute a threat to the safety and soundness of the institution or the interests of its depositors or threaten to impair public confidence in the institution. In determining the degree of risk, the FDIC will consider:

(1) Whether the conviction or program entry into a pretrial or similar program is for a criminal offense involving dishonesty, breach of trust or money laundering and the specific nature and circumstances of the offense;

(2) Whether the participation directly or indirectly by the person in any manner in the conduct of the affairs of the insured depository institution constitutes a threat to the

safety and soundness of the institution or the interests of its depositors or threatens to impair public confidence in the institution;

(3) Evidence of rehabilitation including the person's reputation since the conviction or program entry, employment history, age at the time of conviction or program entry, and the time that has elapsed since the conviction or program entry;

(4) The position to be held or the level of participation by the person at an insured depository institution;

(5) The amount of influence and control the person will be able to exercise over the operation, management or affairs of an insured depository institution;

(6) The ability of management of the insured depository institution to supervise and control the person's activities;

(7) The level of ownership or control the person will have at an insured depository institution;

(8) The applicability of the insured depository institution's fidelity bond coverage to the person; and

(9) Any additional factors in the specific case that appear relevant to the application or the applicant including, but not limited to, the opinion or position of the primary Federal and/or state regulator.

(b) The question of whether a person, who was convicted of a crime or who agreed to a program entry, was guilty of that crime shall not be at issue in a proceeding under this subpart or under 12 CFR part 308, subpart M.

(c) The foregoing factors will also be applied by the FDIC to determine whether the interests of justice are served in seeking an exception in the appropriate court when an

application is made to terminate the ten-year ban prior to its expiration date under 12 U.S.C. 1829(a)(2) for certain Federal offenses.

(d) All approvals and orders will be subject to the condition that the person shall be covered by a fidelity bond to the same extent as others in similar positions. In cases in which a waiver of the institution filing requirement has been granted to an individual, approval of the application will also be conditioned upon that person disclosing the presence of the conviction(s) or program entry(ies) to all insured depository institutions in the affairs of which he or she wishes to participate.

(e) When deemed appropriate, bank-sponsored applications are to allow the person to work in a specific job at a specific bank and may also be subject to the condition that the prior consent of the FDIC will be required for any proposed significant changes in the person's duties and/or responsibilities. In the case of sponsored bank applications such proposed changes may, in the discretion of the Regional Director, require a new application.

(f) In situations in which an approval has been granted for a person to participate in the affairs of a particular insured depository institution and who subsequently seeks to participate at another insured depository institution, another application must be submitted and approved by the FDIC prior to the person participating in the affairs of the other insured depository institution.

### **§ 303.230 What will the FDIC do if the application is denied?**

(a) The FDIC will inform the applicant in writing that the application has been denied and summarize or cite the relevant considerations specified in §303.229 of this subpart.

(b) The denial will also notify the applicant that a written request for a hearing under 12 CFR part 308, subpart M may be filed with the Executive Secretary within 60 days after the denial. The request for a hearing must include the relief desired, the grounds supporting the request for relief, and any supporting evidence.

### **§303.231 Waiting time for a subsequent application if an application is denied.**

An application pursuant to section 19 may be made in writing at any time more than one year after the issuance of a decision denying an application pursuant to section 19. If the original denial is subject to a request for a hearing, then the subsequent application may be filed at any time more than one year after the Board of Directors, or its designee's, decision denying the application. The prohibition against participating in the affairs of a depository institution under section 19 shall continue until the individual has been granted consent in writing to participate in the affairs of a depository institution by the Board of Directors or its designee.

## **PART 308 RULES OF PRACTICE AND PROCEDURE**

1. The authority citation for Part 308 continues to read as follows:

5 U.S.C. 504, 554-557; 12 U.S.C. 93(b), 164, 505, 1464, 1467(d), 1467a, 1468, 1815(e), 1817, 1818, 1819, 1820, 1828, 1829, 1829(b), 1831i, 1831m(g)(4), 1831o, 1831p-1, 1832(c), 1884(b), 1972, 3102, 3108(a), 3349, 3909, 4717, 5412(b)(2)(C), 5414(b)(3); 15

U.S.C. 78(h) and (i), 78o(c)(4), 78o-4(c), 78o-5, 78q-1, 78s, 78u, 78u-2, 78u-3, 78w, 6801(b), 6805(b)(1); 28 U.S.C. 2461 note; 31 U.S.C. 330, 5321; 42 U.S.C. 4012a; Pub. L. 104-134, sec. 31001(s), 110 Stat. 1321; Pub. L. 109-351, 120 Stat. 1966; Pub. L. 111-203, 124 Stat. 1376; Pub. L. 114-74, sec. 701, 129 Stat. 584.

2. Revise Part 308, Subpart M as follows:

**Subpart M— Procedures Applicable to the Request for and Conduct of, a Hearing  
After a Denial of an Application under Section 19 of the FDIA**

Sec.

- 308.156 Scope
- 308.157 Denial of applications.
- 308.158 Hearings.
- 308.159 [Reserved]
- 308.160 [Reserved]

**Subpart M— Procedures Applicable to the Request for and Conduct of, a Hearing  
After a Denial of an Application under Section 19 of the FDIA**

**§ 308.156 Scope.**

The rules and procedures set forth in this subpart shall apply to an application filed pursuant to section 19 of the FDIA (12 U.S.C. 1829) and 12 CFR part 303, subpart L, by an insured depository institution and/or an individual, who has been convicted of any criminal offense involving dishonesty or a breach of trust or money laundering or who has agreed to enter into a pretrial diversion or similar program in connection with the prosecution of such offense, to seek the prior written consent of the FDIC to become



or continue as an institution-affiliated party with respect to an insured depository institution; to own or control directly or indirectly an insured depository institution; or to participate directly or indirectly in any manner in the conduct of the affairs of an insured depository institution after such application has been denied under part 12 CFR part 303, subpart L.

**§ 308.157 Denial of applications.**

If an application is denied pursuant to 12 CFR part 303, subpart L, then the applicant may request a hearing under this subpart M. The applicant will have 60 days after the date of the denial to file a written request with the Executive Secretary. In the request the applicant shall state the relief desired, the grounds supporting the request for relief and provide any supporting evidence that the applicant believes is responsive to the grounds for the denial.

**§ 308.158 Hearings.**

(a) *Hearing dates.* The Executive Secretary shall order a hearing to be commenced within 60 days after receipt of a request for hearing on an application filed pursuant to § 308.159. Upon the request of the applicant or FDIC enforcement counsel, the presiding officer or the Executive Secretary may order a later hearing date.

(b) *Burden of proof.* The ultimate burden of proof shall be upon the person proposing to become or continue as an institution-affiliated party with respect to an insured depository institution; to own or control directly or indirectly an insured depository institution; or to participate directly or indirectly in any manner in the conduct

of the affairs of an insured depository institution. The burden of going forward with a *prima facie* case shall be upon the FDIC.

(c) *Hearing procedure.* (1) The hearing shall be held in Washington, DC, or at another designated place, before a presiding officer designated by the Executive Secretary.

(2) The provisions of §§308.6 through 308.12, 308.16, and 308.21 of the Uniform Rules and §§ 308.101 through 308.102 and 308.104 through 308.106 of subpart B of the Local Rules shall apply to hearings held pursuant to this subpart.

(3) The applicant may appear at the hearing and shall have the right to introduce relevant and material documents and oral argument. Members of the FDIC enforcement staff may attend the hearing and participate as a party.

(4) There shall be no discovery in proceedings under this subpart.

(5) At the discretion of the presiding officer, witnesses may be presented within specified time limits, provided that a list of witnesses is furnished to the presiding officer and to all other parties prior to the hearing. Witnesses shall be sworn, unless otherwise directed by the presiding officer. The presiding officer may ask questions of any witness. Each party shall have the opportunity to cross-examine any witness presented by an opposing party. The transcript of the proceedings shall be furnished, upon request and payment of the cost thereof, to the applicant afforded the hearing.

(6) In the course of or in connection with any hearing under this paragraph, the presiding officer shall have the power to administer oaths and affirmations, to take or cause to be taken depositions of unavailable witnesses, and to issue, revoke, quash, or modify subpoenas and subpoenas *duces tecum*. Where the presentation of witnesses is

permitted, the presiding officer may require the attendance of witnesses from any state, territory, or other place subject to the jurisdiction of the United States at any location where the proceeding is being conducted. Witness fees shall be paid in accordance with § 308.14 of the Uniform Rules.

(7) Upon the request of the applicant afforded the hearing, or FDIC enforcement staff, the record shall remain open for five business days following the hearing for the parties to make additional submissions to the record.

(8) The presiding officer shall make recommendations to the Board of Directors, where possible, within 20 days after the last day for the parties to submit additions to the record.

(9) The presiding officer shall forward his or her recommendation to the Executive Secretary who shall promptly certify the entire record, including the recommendation to the Board of Directors or its designee. The Executive Secretary's certification shall close the record.

(d) *Written submissions in lieu of hearing.* The applicant or the bank may in writing waive a hearing and elect to have the matter determined on the basis of written submissions.

(e) *Failure to request or appear at hearing.* Failure to request a hearing shall constitute a waiver of the opportunity for a hearing. Failure to appear at a hearing in person or through an authorized representative shall constitute a waiver of a hearing. If a hearing is waived, the person shall remain barred under section 19.

(f) *Decision by Board of Directors or its designee.* Within 60 days following the Executive Secretary's certification of the record to the Board of Directors or its designee,

the Board of Directors or its designee shall notify the affected person whether the person shall remain barred under section 19. The notification shall state the basis for any decision of the Board of Directors or its designee that is adverse to the applicant.

**§308.159 [Reserved]**

**§308.160 [Reserved]**

Federal Deposit Insurance Corporation.  
By order of the Board of Directors,  
Dated at Washington, DC, on November 19, 2019.

**Annmarie H. Boyd,**  
*Assistant Executive Secretary*

[FR Doc. 2019-26351 Filed: 12/13/2019 8:45 am; Publication Date: 12/16/2019]